89- 1406

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BERNARD S. NEISTEIN,

Petitioner,

v.

ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

1. Does a state supreme court disciplinary rule (the "Disciplinary Rule") which authorizes attorneys to make judicial campaign loans or gifts but which disciplines attorneys who make non-judicial campaign loans or gifts violate the equal protection clauses of the U.S. Constitution and Illinois Constitutions?

2. Has there been a denial of due process where two of the four state court justices who decided that the Disciplinary Rule did not violate equal protection had received significant loan and gift lawyer campaign contributions in their last judicial campaigns?

3. Has there been a denial of due process where two of the four state court justices who decided that the Disciplinary Rule was constitutional and who had received judicial campaign loans and gifts from lawyers refused to recuse themselves although requested to do so?

PARTIES TO THE PROCEEDINGS

Petitioner Bernard S. Neistein was respondent before the Supreme Court of Illinois. The Illinois Attorney Registration and Disciplinary Commission petitioner before the Supreme Court of Illinois, commenced the disciplinary proceeding against Bernard S. Neistein and is the Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner Bernard S. Neistein, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois entered in this case on May 10, 1989.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (the "Opinion") is reprinted in Appendix A, hereto, and is not yet reported. The Report and Recommendation of the Review Board of the Illinois Attorney Registration and Disciplin-

ary Commission ("ARDC") is reprinted in Appendix C and, the opinion of the Hearing Panel is reprinted in Appendix D; both are unreported.

JURISDICTION

The final decision of the Supreme Court of Illinois was entered on May 10, 1989. App. A. A timely petition for rehearing was filed on November 15, 1989, and denied on December 4, 1989. App. B. The jurisdiction of this Court to review the judgment below is invoked under 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Disciplinary Rule 7-110(a) of the Illinois Code of Professional Responsibility, provides:

> "A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal except those gifts or loans which a judge or a member of

his family may receive under Rule 65(C)(4) of the Code of Judicial Conduct, except that a lawyer may make a contribution to the campaign fund of a candidate for such office."

Relevant portions of the Illinois Disclosure of Campaign Contributions and Expenditures Act are as follows:

"§ 9-10. The treasurer of every state political committee and the treasurer of every political committee shall file with the Board, and the treasurer of every local political committee shall file with the county clerk, reports of campaign contributions and expenditures on forms to be prescribed or approved by the Board. The treasurer of every political committee that acts as both a state political committee and a local political committee shall file a copy of each report with the county clerk." Ill.Rev.Stat. 1987, ch. 46, par. 9-10.

"§ 9-17. All statements and reports filed under this Article with the Board or county clerk shall be available for examination and copying by the public at all reasonable times. Such person examining a statement or report must first fill out a form prepared by the Board identifying the examiner by name, occupation, address and telephone number, and listing the date of examination and reason for such examination. The Board shall supply such forms to the county clerks annually and replenish such forms upon request.

The Board or county clerk, as the case may be, shall promptly notify each political committee required to file a statement or report under this Article of each instance of an examination of its statement or report by sending it a duplicate original of the identification form filled out by the person examining its report." Ill.Rev.Stat. 1987, ch. 46, par. 9-17.

Relevant portions of the Illinois Governmental Ethics Act provide:

"§ 4A-101. The following persons shall file verified written statements of economic interests, as provided in this Article:

* * *

(e) Holders of, and candidates for nomination or election to, the office of judge or associate judge of the Circuit Court and the office of judge of the Appellate or Supreme Court;" Ill.Rev.Stat. 1987, ch. 127, par. 604A-101.

"§ 4A-102. The statement of economic interests required by this Article shall include the economic interests of the person making the statement as provided in this Section. The interest (if constructively controlled by the person making the statement) of a spouse or any other party, shall be considered to be the same as the interest of the person making the statement. Campaign receipts shall not be included in this statement.

(a) The following interests shall be listed by all persons required to file:

* * *

(5) The name of any entity from which a gift or gifts, or honorarium or honoria, valued singly or in the aggregate in excess of $500, was received during the preceding calendar year." Ill.Rev.Stat. 1987, ch. 127, par. 604A-102.

"All statements of economic interests filed under this Section shall be available for examination and copying by the public at all reasonable times. Each person examining a statement must first fill out a form prepared by Secretary of State identifying the examiner by name, occupation, address and telephone number, and listing the date of examination. The Secretary of State shall supply such forms to the county clerk annually and replenish such forms upon request.

The Secretary of State or county clerk, as the case may be, shall promptly notify each person required

to file a statement under this Article of each instance of an examination of his statement by sending him a duplicate original of the identification form filled out by the person examining his statement." Ill.Rev. Stat. 1987, ch. 127, par. 604A-106.

Illinois Supreme Court Rule 68 provides, in relevant part:

"A judge shall file annually with the Clerk of the Illinois Supreme Court (the Clerk) a verified written statement of economic interests and relationships of the judge and members of the judge's immediate family (the statement).

* * *

All statements filed under this rule shall be available for examination by the public during business hours in the Clerk's office in Springfield or in the satellite office of the Clerk in Chicago. Original copies will be maintained only in Springfield, but requests for examination submitted in Chicago will be satisfied promptly. Each person requesting examination of a statement or portion thereof must first fill out a form prepared by the Director specifying the statement requested, identifying the examiner by name, occupation, address and telephone number, and listing the date of the request and the reason for such request. The Director shall supply such forms to the Clerk and replenish such forms upon request. Copies of statements or portions of statements will be supplied to persons ordering them upon payment of such reasonable fee per page as is required by the Clerk. Payment may be by check or money order in the exact amount due.

The Clerk shall promptly notify each judge required to file a statement under this rule of each instance of an examination of the statement by sending the judge a copy of the identification form filled out by the person examining the statement.

> The contents of the statement required by this rule shall be as specified by administrative order of this court."

The Administrative Order effectuating Illinois Supreme Court Rule 68 provides, in relevant part:

> "The verified statements of economic interests and relationships referred to in our Rule 68, as amended effective August 1, 1986, shall be filed by all judges on or before April 30, 1987, and on or before April 30, annually thereafter. Such statements shall also be filed by every person who becomes a judge, within 45 days after assuming office. The form of such statements shall be as provided by the Administrative Director of the Illinois Courts, and they shall include all information required by Rule 68 and this order, including:
>
> * * *
>
> 3. The names of all creditors to whom amounts in excess of $500 are owed by the judge or members of the judge's immediate family (spouse and minor children residing with the judge) or were owed during the year preceding the date of verification."

Article VI, Section 3 of the Illinois Constitution of 1970 provides:

> "The Supreme Court shall consist of seven Judges. Three shall be selected from the First Judicial District and one from each of the other Judicial Districts. Four Judges constitute a quorum and the concurrence of four is necessary for a decision. Supreme Court Judges shall select a Chief Justice from their number to serve for a term of three years."

STATEMENT OF THE CASE

The Illinois Supreme Court suspended petitioner Bernard S. Neistein from the practice of law in the State of Illinois for a period of thirty (30) months for a claimed violation of Illinois Supreme Court Rule 7-110(a) ["Rule 7-110(a)"]. Rule 7-110(a) authorizes lawyers to make judicial campaign contributions in the nature of loans and gifts, but prohibits attorneys from making non-judicial campaign loans and gifts to judges even though such non-campaign loans and gifts were not intended to and have no effect on the administration of justice. As described below, Petitioner made no loans or gifts. Petitioner did make certain involuntary payments at the specific requests of a judge.

Petitioner is a respected attorney who has practiced in Illinois for over fifty (50) years and who has served as a Master in Chancery, an Illinois State Representative, an Illinois State Senator, and as Chairman of the Illinois Senate Judiciary Committee where he was instrumental, among other things, in passing state judicial reform (Tr. 80, 81). While he was in the State Senate, Petitioner received an award as the best Illinois legislator and also was a strong legislator on behalf of the poor (Tr. 80-82).

Petitioner also served in France, Germany and England in World War II as an enlisted man until he received a battlefield commission and was separated as an officer. Petitioner is licensed before this Court, the U.S. District Court for the Northern District of Illinois and the U.S. Department of Immigration (Tr. 29). He graduated first in his class from DePaul University School of Law at the age of 19. Because he was not 21 years old, he had to

obtain special permission from the Illinois Supreme Court to take the bar examination (Tr. 77). Petitioner opened his practice during the Depression in back of his parents' cleaning store (Tr. 78). No prior disciplinary complaints have ever been filed against Petitioner.

In either late 1979 or early 1980 and prior to the July 1, 1980 effective date for Rule 7-110(a), Judge Reginald Holzer, whom Petitioner knew casually, who at that time was a judge of the Circuit Court of Cook County, who had been a candidate for the Illinois Supreme Court and who had been considered for a federal judgeship, called Petitioner on the telephone and asked Petitioner to come to the judge's chambers. Petitioner complied with the judge's request. After arriving, Judge Holzer asked Mr. Neistein for a $10,000 personal loan.

Petitioner responded, "I'll get back to you," and returned to his office where he spoke with one of his law partners (Tr. 34, 35). They agreed that Petitioner would not make a personal loan, but instead, Judge Holzer would be referred to the Republic Bank of Chicago (the "Bank") where he would have to stand on his own to obtain a loan. (Tr. 35, 113). Petitioner, three other attorneys at Petitioner's law firm and the firm's profit sharing trust owned a total of twenty-five (25%) percent of the stock of the Bank. (Tr. 111). However, they exerted no influence whatsoever with respect to whether the Bank would loan Judge Holzer any money.

Petitioner returned to Judge Holzer's chambers and told the judge that he would not make a personal loan and that he should apply to the Bank for a loan but that he would have to qualify for the loan and stand on his own. Petitioner had no contact with anyone at the Bank regarding approval of a loan to Judge Holzer (Tr. 64, 65), did

not guarantee the loan, made no attempt to influence the loan, and in fact, did not know who approved the loan (Tr. 65). Petitioner was not on the Bank's loan committee or board of directors, held no administrative position with the Bank, and as a shareholder had no ability to approve, influence or review the loan (Tr. 36, 65).

Although Petitioner did not know why the judge originally contacted him (Tr. 90, 81), at his hearing before a panel of the Illinois Attorney Registration and Disciplinary Commission ("ARDC") in response to a Panel question, Petitioner speculated that possibly Judge Holzer had picked him out to request a loan because he was an attorney in Chicago that the judge thought that he could obtain money from (Tr. 91) and Petitioner was known as a "patsy" who gave money to many people and charities. (Tr. 91).

Petitioner, for example, although not a Roman Catholic, singlehandedly had raised money to keep both a Roman Catholic school, St. Phillip Academy, and a Roman Catholic church, Our Lady of Sorrow Church, in Chicago open for four more years after then Cardinal Cody ordered them closed (Tr. 83). As a result, Petitioner had been knighted by the Roman Catholic Church (Tr. 83). As a fund raiser, Petitioner was a member of the board of directors of the Chicago Loop Synagogue and Northwest Home For The Aged, Chairman of Sports Lodge B'nai B'rith, which awards approximately 25 or 26 college scholarships each year to needy children, and Chairman of Trades and Industry for Israel Bonds (Tr. 83). As its Chicago representative, he was a fund raiser for Cardozo School of Law, which is part of Yeshiva University in New York (Tr. 84).

The Chairman of the Bank testified that the Bank at that time was underloaned and looking for loans, that the

Chairman acting alone approved a $10,000 unsecured loan to Judge Holzer (which was within his lending limits and did not require director or loan committee approval), that the loan was only approved after the Bank received a completed Holzer financial statement, a loan application, and a credit check which showed that the judge had the highest possible credit rating, that the Bank followed all normal procedures in evaluating and subsequently approving a $10,000 unsecured loan for Judge Holzer, and that no one else had anything to do with the making of the loan (Tr. 181, 254, 255). The Holzer financial statement showed a net worth of $123,000 and an annual income of $111,250.

Petitioner's law partner was a Bank director who received ten days or two weeks before each directors' meeting a Directors' Report. One such report showed the Holzer loan was delinquent as to an interest payment. Petitioner's law partner told Petitioner about the default and asked Petitioner to tell Judge Holzer to make his payment (Tr. 41, 123). Petitioner went to Judge Holzer's chambers to ask about the delinquency (Tr. 41), and Judge Holzer told Petitioner in a strong tone of voice to "pay $500 on account of principal and $300 on account of interest". Petitioner's precise testimony (Tr. 94) in response to a question from the Panel was:

> "Well, the first payment was due and I went to him and I said "Say, the loan was just made. The first payment is due. You haven't made the first payment. And he says "make—he didn't say "I want you to"—he said "make the payment" or "make a payment", "pay 500 on the principal and 300 on the interest."
>
> Q. Did he threaten you at that time?
>
> A. He didn't threaten me but his voice was "make a payment". I could tell [from] the tone of voice what that means.

> Q. You were concerned based on his tone of voice, not on the words he said [?].
>
> A. Well, I was concerned on both, but [the] tone of voice was "make a payment", strong." (Tr. 93, 94).

After leaving Judge Holzer, Petitioner returned to his office and discussed with his law partner the fact that Judge Holzer was a dangerous and vindictive person and a powerful Chancery judge who was being considered for a federal judgeship (Tr. 67, 72, 90, 91, 94, 95, 125). They also considered an incident that had occurred years prior when Holzer had been attorney for the Sheriff of Cook County, in which Holzer had caused a witness to be arrested and then had unsuccessfully attempted to coerce the witness to make false statements to the police. They concluded that Judge Holzer was a dangerous man to cross. (Tr. 69, 70, 94, 155). They also discussed the fact that adverse publicity concerning a defaulted loan to a powerful judge would receive substantial media publicity which would adversely affect the Bank.

As a result, after Judge Holzer told Petitioner to make the payment to the Bank, Petitioner and his partner decided that the integrity of the Bank had to be preserved and they made the payment themselves from their personal funds by means of money orders which showed Judge Holzer as the remitter (Tr. 127, 128, 184). They did not know about Rule 7-110(a), which had only been in effect for a short time, they felt that this demand would be an isolated one and they did not realize that there would be other demands (Tr. 136, 137). However, Judge Holzer's demands did not stop after the first payment. They were repeated and continuous and Petitioner and his law partner continued to comply with them until the judge's demands stopped. Petitioner and his partner probably paid between $6,800 to $7,200 on account of Judge Holzer's loan at the Bank (Tr. 66, 139).

Petitioner was not aware of Rule 7-110(a) while these payments were being made (Tr. 58, 181), did not voluntarily make payments on account of Judge Holzer's Bank loan and never made a payment without a demand from the judge (Tr. 65, 66, 152). Petitioner's law firm had pending cases before Judge Holzer, a fact of which Petitioner was not aware (Tr. 73) because the firm had a separate litigation department and Petitioner was not a litigator. Petitioner did not know who the litigation clients were or to which courtrooms their cases were assigned (Tr. 99).

There were no discussions about Judge Holzer awarding attorney's fees, receiverships, or making rulings in cases, nor were their discussions related in any way to cases which Judge Holzer had before him (Tr. 73). Neither Petitioner nor his law firm nor any client of theirs received any favorable treatment from Judge Holzer during this time or afterwards (Tr. 73). In fact, the contrary was true. Of the pending cases which Petitioner's firm had before Judge Holzer, all were settled without the aid of the Court or substantive rulings except for two in which Judge Holzer ruled against the clients of Petitioner's law firm several times. As a result, one such client fired Petitioner's law firm.

The ARDC Administrator filed a complaint and Petitioner fully cooperated with the ARDC and the ARDC Hearing Panel. After a hearing, the Hearing Panel found a single violation of the Code of Professional Responsibility—that Petitioner and his law partner had violated Rule 7-110 by making payments on Judge Holzer's loan. The Hearing Panel went on to factually find, that (1) neither Petitioner nor Petitioner's law partner had a specific intent to influence Judge Holzer on any specific case; (2) that the Bank loan payments "were not completely voluntary"; and (3) "there was some coercion by the Judge."

The Panel went on to hold that specific intent to influence cases is not required for a violation of the Code of Professional Responsibility to occur and that the "breadth and scope of their [Petitioner's and his law partner's] activities were sufficient to violate the rule." App. D.

On May 14, 1988 the ARDC Review Board concurred in the findings of fact, conclusions of law and recommendation of the Hearing Board that Petitioner and his law partner be suspended for thirty (30) months. App. C. On May 10, 1989, four justices, including Justices Benjamin Miller and Horace Calvo, of the seven-judge Illinois Supreme Court issued the Opinion suspending Petitioner from the practice of law for thirty (30) months[1] for violation of Rule 7-110(a).

Petitioner argued and the four-justice majority of the Illinois Supreme Court rejected Petitioner's claim that Rule 7-110(a) is unconstitutional because it excludes from discipline gifts and loans made by lawyers as judicial campaign contributions even though such gifts and loans were made with an improper motive and an intent to influence a judge while imposing discipline on non-campaign gifts and loans to judges even though there was no intent to affect and no effect on the administration of justice. The four-judge majority held:

> "The Illinois Constitution, article VI, section 13(a), states: 'The Supreme Court shall adopt Rules of Conduct for Judges and Associate Judges.'
>
> In carrying out the mandate of article VI, section 13(a), it was certainly reasonable to provide for an

[1] Although there are seven Justices on the Illinois Supreme Court, only four participated in the decision. Justices Ward, Clark and Stamos took no part in the consideration or decision in this case without explanation as to why they did not participate.

exception as to gifts and loans to a judge for campaign purposes. All judges are treated equally and fairly by the rule; the integrity of the legal profession is upheld, as the gifts and loans are publicly disclosed and donors are also treated fairly and equally.

Under the Disclosure of Campaign Contributions and Expenditures Act, enacted by the General Assembly in 1974, all candidates and their campaign committees are required to report their loans and campaign contributions; copies of said reports are then available to the public. (Ill.Rev.Stat. 1987, ch. 46, par. 9-1 *et seq.*) This public disclosure results in all attorneys being aware of who contributed or made loans to a judge. Thus, opposing counsel has knowledge of any campaign gifts or loans, whereas the respondents in this case made their loans to Judge Holzer without disclosure to even their partners and in a manner to make knowledge of their payments unavailable to anyone, even the recipient bank.

We find DR 7-110(A) to be constitutional." App. A, at 8-9.

The participation of Justices Benjamin Miller and Horace Calvo in the decision upholding the constitutionality of Rule 7-110(a) was improper and a denial of due process, and Petitioner timely raised his constitutional claims. In briefing the matter before argument, Petitioner noted that, depending upon which justices participated in the decision as to whether Rule 7-110(a) violated the equal protection clauses of the Constitutions of the United States and Illinois, there might be a due process violation because due process requires a fair, impartial and unbiased tribunal. Justices Miller and Calvo, however, went on to participate in the decision to suspend Petitioner even though, as described below, as shown by Appendices E, F, G and H, their last judicial campaigns had received

thousands of dollars in lawyer loans and gifts in the form of campaign contributions and even though, as described below, Justice Miller appeared to have personally received, after his election to the Illinois Supreme Court, $28,540 from funds raised by a committee to retire his campaign debt, at least 75% of the committee's membership being composed of lawyers who contributed 78% of the money and some of whom individually made significant contributions. Justices Thomas Moran and Howard Ryan did not appear to have received such contributions in their last judicial campaigns.

In his petition for rehearing before the Illinois Supreme Court, Petitioner requested that Justices Miller and Calvo recuse themselves, but they participated in the decision to deny the petition for rehearing. Nothing in the order denying the petition for rehearing indicated that the continued participation of Justices Miller and Calvo was based upon the doctrine of necessity although when that doctrine is the basis for participation, the court so states.

Petitioner included in his appendix to his petition for rehearing the Campaign Disclosure Statements of Justices Miller and Calvo showing that they had received substantial lawyer gifts and loans as campaign contributions and, in particular, that Justice Miller's campaign debt retirement committee received $28,540 in attorney contributions after he became a justice, which moneys appeared to have been used to repay loans that Justice Miller had personally made to his own campaign. Petitioner again asserted that judges who received judicial campaign contributions should not participate in a decision as to whether the exemption in Rule 7-110(a) for campaign contributions was constitutional, in part, because they would be declaring that their own lawyer campaign contributors or

lawyers whose contribution gifts served to pay back a justice's campaign loans did not violate Rule 7-110(a). The four justices denied Petitioner's request for a rehearing without addressing the denial of Petitioner's due process rights.

REASONS FOR GRANTING THE WRIT

Rule 7-110(a) violates the equal protection clauses of the Constitutions of the United States and of Illinois. Under the rule, the Illinois Supreme Court expressly authorizes attorneys to make campaign loans and gifts to judges, without restriction, whether or not the lawyer donors or lenders appear before the judicial recipient on either an occasional or regular basis, even though the motive for the campaign loan or gift may be grossly improper and even though the judicial campaign loan or gift may directly affect the administration of justice. Rule 7-110(a), on the other hand, prohibits attorneys from making non-campaign loans and gifts to judges even though there is no improper motive in the making thereof and no intended or actual effect on the administration of justice.

Rule 7-110(a) creates two classes of lenders and donors for which there is no rational distinction. One is sanctioned, the other is penalized. The permitted class consists of attorneys who make campaign loans and gifts to judges. The prohibited class consists of attorneys who made non-campaign loans and gifts to judges. As a result, by rule there is a court-authorized solicitation of lawyers for judicial campaign loans and gifts which should not be permitted and is subject to great abuse, both potential and actual.

Judges have wide acquaintances among persons other than lawyers. There are many sources other than lawyers from which judges can obtain campaign funds. If there is a reason for a rule of court which expressly authorizes lawyers to make judicial campaign loans and gifts, it would appear to be because they are easy targets who cannot refuse a request for such contributions. The fact that Rule 7-110(a) expressly authorizes campaign loans and gifts from lawyers serves to make it open season on lawyers to make judicial campaign loans and gifts by those who solicit for such funds.

Just as with Petitioner, who did not even make either a loan or a gift but rather who made involuntary payments, whatever form a judicial or judicially authorized solicitation for money takes, it is extremely difficult for a lawyer to dodge the solicitation bullet and not comply. Therefore, because it creates both a penalized class and a sanctioned class for which there is no distinction, Rule 7-110(a) violates the equal protection clauses of the constitutions of both the United States and the 1970 Illinois Constitution.

As Petitioner also argued, lawyer loans or gifts in the nature of campaign contributions can have a great effect on the independence and impartiality of the judge because a judge receives direct benefits from them. Campaign contributions can mean the difference between being elected or defeated, from having a job and salary or not, from being elevated to a higher judicial office, or from receiving a pension, a higher pension or no pension (if the judge has not served a sufficient amount of time to qualify for a pension).

There also are no effective restrictions against a judge borrowing from campaign funds for personal use or using

such funds to pay family members in connection with a campaign. Wives, children, and other family members can serve as paid campaign managers, co-campaign managers, coordinators, publicists, and other paid workers at very large salaries. *See*, *Troy v. State Board of Elections*, 84 Ill.App.3d 740, 406 N.E.2d 562 (1st Dist. 1980).

As may have happened here, a judicial candidate can personally loan money to his campaign and be repaid from the contributions of lawyers who may come before or practice before him. A judge can personally guarantee a loan for his campaign, and a lawyer's contribution can, therefore, reduce the judge's personal liability on the loans. Indeed, it appears that Judge Holzer faced financial burdens because of his inability to reduce the debt incurred in his campaigns. *See*, *In re Chatz*, 131 Ill.2d 499, 546 N.E.2d 613 (1989).

There is no rational or reasonable basis for the distinction between campaign and non-campaign judicial loans and gifts. For example, as shown in Appendix E, one of the attorneys facing discipline in an Illinois Supreme Court disciplinary case involving a violation of Rule 7-110(a) entitled *In re Corboy*, 124 Ill.2d 29, 528 N.E.2d 694 (1988), Philip Corboy, had donated money to Justice Miller's election campaign. In addition, after Justice Miller's election, six members of Mr. Corboy's law firm each donated funds to an entity called the "Committee to Retire Justice Miller's Campaign Debt" at the time that Mr. Corboy's case came before or was about to come before the Illinois Supreme Court. According to Appendix F, these funds appear to have gone directly to repay, in part, a loan which Justice Miller himself had made to his own campaign. Justice Miller participated and voted in the *Corboy* decision in which the court discharged the complaint against respondent Corboy without sanction

despite finding that Mr. Corboy had violated Rule 7-110(a) by making a loan to the presiding judge of the First Municipal District of the Circuit Court of Cook County, Illinois. Although the *Corboy* decision was issued as a *per curiam* opinion, because of the collegial exchange of ideas in private, Justice Miller's contribution to the outcome of the *Corboy* decision may never be known. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 833, 89 L.Ed.2d 823, 106 S.Ct. 1580, 1591 (1986) (Blackmun, J., concurring in the judgment).

Indeed, the *Corboy* decision is at odds with the Illinois Supreme Court's opinion suspending Petitioner since the same factors cited in mitigation in *Corboy*—the fact that the attorneys acted without the guidance of precedence or settled opinion and the outstanding reputations of the attorneys in question—are present in Petitioner's case. 528 N.E.2d, at 701. The factors cited in aggravation against Petitioner—the fact that there were pending cases and the failure to disclose the financial tie to opposing attorneys—were also present in *Corboy* but not addressed. App. A, at 7-8. In fact, the Illinois Supreme Court made no attempt to distinguish *Corboy* from Petitioner's situation despite the similarity of the two cases.

The proffered explanation by the four justices (with Justice Calvo writing the Opinion) for the distinction between campaign and non-campaign loans and gifts is unsound, ignores the existence of a state statute and court rule, and demonstrates that the court itself could find no rational basis for the distinction. The Opinion clearly struggled to find a reason.

Justice Calvo in the Opinion reasoned that disparate treatment of campaign and non-campaign gifts and loans was justified because there was public disclosure of campaign contributions under the Illinois Disclosure of Cam-

paign Contributions and Expenditures Act (the "Campaign Disclosure Act"), Ill. Rev. Stat., 1987, ch. 46, par. 9-1, *et seq.*, but that there was no similar disclosure for non-campaign loans and gifts. Therefore, the Opinion reasoned that because there was disclosure of lawyer loans or gifts to judicial campaigns, the exemption from Rule 7-110(a) for those types of gifts was constitutional. The Opinion is incorrect for several reasons.

First, the Opinion is incorrect that non-judicial campaign loans and gifts are not disclosed. They are. Non-campaign gifts are in fact required to be publicly disclosed by the recipient under Article 4A of the Illinois Governmental Ethics Act (the "Ethics Act"), (Ill. Rev. Stat. 1987, ch. 127, par. 604A-101, *et seq.*) without the attorney who made the loan doing anything. Copies of such reports are available to the public. Ill. Rev. Stat. 1987, ch. 127, par. 604A-101 *et seq.* Non-campaign judicial loans are required to be disclosed under Illinois Supreme Court Rule 68. Again, copies of such reports are available to the public for examination. Thus, opposing counsel has access to the same knowledge of the existence of non-campaign gifts or loans to a judge as he has in the case of judicial campaign gifts or loans. Disclosure, therefore, cannot be the basis for treating campaign contributors differently from other donors because, by statute and rule, the disclosure is virtually the same.

Second, contrary to the Opinion, opposing counsel does not necessarily have knowledge of campaign gifts or loans, but merely the possibility of access to such knowledge. The Campaign Disclosure Act requires a request for campaign information to be made in writing on an identification form filled out by the person examining the campaign report. The campaign committee of the judge is notified of any such request. Ill.Rev.Stat. 1987, ch. 46, par. 9-17.

The *en terrorem* effect on any lawyer who considers making such an information request is obvious because the lawyer knows that the fact that the request is being made is communicated to the judge's campaign manager who may communicate the information to the judge (or the judge may even be his own campaign manager).

The Campaign Disclosure Act places the burden of disclosure on the judge, not the campaign donor or lender, and puts the burden of seeking such information on opposing counsel when the judge before whom he will be appearing would most likely be notified of and possibly offended by such action. Meanwhile, the Opinion for the first time puts the burden on the attorney who makes a non-campaign gift or loans, to disclose in some unspecified fashion the gift or loan or face discipline, even though Rule 7-110(a) does not state such a requirement and contains no mechanism for making such disclosure. Again, attorneys making campaign contribution gifts or loans are treated differently from other attorneys who make donations.

Third, Rule 7-110 (a) does not state to whom disclosure is to be made, contains no means and makes no provision for disclosure in the case of non-campaign loans and gifts. The court promulgated Rule 7-110(a). Although Rule 7-110(a) does not so state, the fact that the Opinion holds that because campaign contributions and loans are publicly disclosed, their making does not violate Rule 7-110 is not a rational basis for distinction because in Rule 7-110(a) lawyers are not told that disclosure means no violation and because Rule 7-110(a) provides no disclosure mechanism and exemption for lawyers who make non-campaign loans and/or gifts. If disclosure is the key to non-violation of any portion of the rule, then Rule 7-110(a) should expressly so state, describe to whom disclosure is to be

made, contain some method by which disclosure of non-campaign judicial loans and gifts can be made and state that there is an exemption from violation of the rule if disclosure is made pursuant to the method provided. Since Rule 7-110(a) contains no such provisions, despite the Opinion's rationale, the rule still leaves two unequal classes, only one of which (non-campaign loans and gifts) is punished. There is no reason for the Opinion's distinction. For this reason also, Rule 7-110(a) is, therefore, unconstitutional. Additionally, this is the first time that the court has held that non-disclosure is the key to non-violation of Rule 7-110(a). Respondent should not be sanctioned for not knowing that if there had been disclosure, there was no violation.

Equally importantly, Petitioner was denied due process because Justices Miller and Calvo should not have participated in this case in deciding whether campaign gifts and loans from attorneys should be treated differently than non-campaign gifts and loans because they both received substantial campaign contributions from lawyers. Justice Miller also should not have participated because, after his election, he appears to have received substantial donations from attorneys to retire his campaign debt, which moneys appear to have been used, in whole or in part, to repay loans that he appears personally to have made to his own campaign committee. If that is true, it means that he possibly received lawyer-contributed campaign money personally. If that is so, Justice Miller had a direct stake in finding that donors to his judicial campaigns had not violated Rule 7-110(a) by upholding the Rule 7-110(a) exemption for campaign contributions. The fact that lawyer-campaign contributions presumably enabled Justice Calvo to be elected gives him an almost equally direct stake.

A state cannot exclude a person from the practice of law in a manner which offends either the due process clause or the equal protection clause. *Schware v. Board of Bar Examiners of State of New Mexico*, 353 U.S. 232, 1 L.Ed.2d 796, 77 S.Ct. 752 (1957). Due process requires a fair, impartial and unbiased tribunal. *Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed. 2d 287, 90 S.Ct. 1011 (1970); *In re Murchinson*, 349 U.S. 133, 99 L.Ed 942, 75 S.Ct. 623 (1955). "The neutrality requirement helps to guarantee that life, liberty and property will not be taken on the basis of an erroneous or distorted conception of the facts or law," while at the same time, "ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbitrator is not predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 64 L.Ed. 2d 182, 100 S.Ct. 1610, 1613 (1980). Because of the participation of Justices Miller and Calvo, Petitioner did not have such a tribunal here.

Beginning with *Tumey v. Ohio*, 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437 (1927), this Court has made clear that persons with substantial pecuniary interests in legal proceedings should not adjudicate those disputes. In order to disqualify an arbitrator, the financial stake need not be as direct or positive as it appeared to be in *Tumey*. *Gibson v. Berryhill*, 411 U.S. 564, 36 L.Ed. 2d 488, 93 S.Ct. 1689, 1698 (1973), *citing*, *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 34 L.Ed. 2d 267, 93 S.Ct. 80 (1972). "This requirement of neutrality has been jealously guarded by this Court." *Marshall v. Jerrico, Inc.*, 446 U.S. at 242, 100 S.Ct. at 1613. Due process may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. *In re Murchin-*

son, 349 U.S. 133, 136, 99 L.Ed. 942, 75 S.Ct. 623, 625 (1955). The issue is whether the circumstances "would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true * * *." *Tumey v. Ohio*, 273 U.S., at 532, 47 S.Ct., at 444.

Justices Miller and Calvo clearly had a "direct, personal, substantial, [and] pecuniary interest" in upholding the exemption contained in Rule 7-110(a). *Tumey v. Ohio*, 273 U.S. at 523, 47 S.Ct. at 441. As revealed in Appendix F, after his election Justice Miller appears to have received $28,540 in 1985 to retire his 1984 campaign debt. Judge Miller's original disclosure statement reveals that he had loaned his campaign $62,977.36. App. E. The $28,540 was transferred "to another account of Justice Miller" so it appears that the funds were used to repay Justice Miller's loan to his own campaign. App. F. Approximately seventy-five (75%) percent of the donors listed on the disclosure statement for the Committee to Retire Justice Miller's campaign debt are registered as attorneys in Illinois, and they donated approximately seventy-eight (78%) percent of the funds which Justice Miller may have received personally. App. H. Furthermore, Justice Miller's campaign committee still owes him a substantial sum of money, and nothing precludes future solicitations from attorneys to retire this debt, particularly now that the Opinion by implication sanctions that practice. Judicial campaign committees and committees to retire judicial campaign debt sometimes go on for very long periods of time.

Thus, Justice Miller's ability to retire his campaign debt and be repaid turned and may continue to turn upon the validity of the distinction between campaign and non-cam-

paign gifts and loans contained in Rule 7-110(a). There was a temptation not to hold the balance nice, clear and true. The Opinion upholding the constitutionality of Rule 7-110(a) substantially advanced Justice's Miller's opportunity to attain a goal (retirement of his campaign debt) even though that goal was not actually attained through the disciplinary proceedings against Petitioner. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 830, 89 L.Ed. 2d 823, 106 S.Ct. 1580, 1589-90 (1986) (Brennan, J., concurring).

Justice Miller's stake in the outcome of the Illinois Supreme Court's decision was more direct and positive than the adjudicators' stakes in *Ward* or *Gibson*. In *Ward*, this court invalidated a procedure under which sums received as fines imposed by a mayor's court accounted for substantial revenues of the municipality although the mayor himself did not receive any direct, pecuniary benefit. The court found the requisite "possible temptation" necessary for disqualification "when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." 409 U.S., at 60, 93 S.Ct., at 83. In *Gibson*, this court found a sufficient interest to disqualify members of a state board of optometry who were practicing optometrists from hearing charges filed against competing optometrists.

While Justices Miller and Calvo were only two of the four justices who joined in the Court's decision, their votes were decisive. Under Article VI, Section 3 of the 1970 Illinois Constitution, the concurrence of four judges is necessary for a decision of the Illinois Supreme Court. Thus, the "appearance of justice" will best be served by vacating the decision and remanding the cause for further proceedings. *Aetna Life Insurance Co. v. Lavoie*, 475

U.S. 813, 828, 89 L.Ed. 2d 823, 106 S.Ct. 1580, 1588-89 (1986).[2] If the Illinois Supreme Court seeks to suspend Petitioner from the practice of law for calling into question the impartiality and independence of a judge, then that court should be held to the same standard of impartiality and independence. As this Court has often noted, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 99 L.Ed. 11, 75 S.Ct. 11, 13 (1954). This is particularly true in attorney disciplinary actions because "for most attorneys the license to practice law represents their livelihood, loss of which may be a greater punishment than a monetary fine." *Erdmann v. Stevens*, 458 F. 2d 1205, 1209-10 (2d Cir. 1972). Petitioner has been deprived of his livelihood in a proceeding offensive to due process and by a rule which violates equal protection.

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[2] A decision by the Illinois Supreme Court on remand, without the participation of Justices Miller and Calvo is certainly attainable. While Justices Ward, Clark and Stamos did not participate in the original decision, nothing precludes their participation in the decision on remand. In fact, Justice Moran took no part in denying the Administrator's motion for interim suspension of Petitioner but did participate in the later decision on the merits.

CONCLUSION

Petitioner has not been afforded an opportunity to test the constitutionality of the Illinois Supreme Court's disciplinary Rule 7-110(a) before an unbiased, impartial tribunal. Accordingly, this Court should grant a writ of certiorari, reverse the decision below, and remand the cause to afford Petitioner his due process and equal protection rights.

Respectfully submitted,

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